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In the Supreme Court of the United States

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The statute at issue in this case is a critical tool for fighting the scourge of drug use and trafficking in public housing complexes and by public housing residents. See Pet. 15; Pet. App. 2a-3a. It provides that public housing leases must

> provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. 1437d(*l*)(6) (Supp. V 1999). This petition involves drug-related criminal activity by a "member of the tenant's household" that takes place outside the tenant's apartment. See Pet. 21 n.7. The court of appeals held that in those circumstances, "if a tenant has taken reasonable steps to

prevent criminal drug activity from occurring, but, for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member or guest, § 1437d(*l*)(6) does not authorize the eviction of such a tenant." Pet. App. 26a. In other words, if the tenant does not have knowledge of the drug activity, the tenant may not be evicted under Section 1437d(*l*)(6).

As we explain in the petition (at 24-29), the court of appeals' decision is seriously flawed, conflicting with the text, purposes, legislative history, and HUD's authoritative administrative interpretation of Section 1437d(*l*)(6). See also pages 8-9, *infra*. Indeed, in their brief in opposition, respondents offer no defense of the court of appeals' ruling on the merits. That erroneous ruling by the en banc Ninth Circuit—issued over four dissents—warrants review by this Court, because it conflicts with state supreme court precedent and seriously undermines the ability of Congress and public housing authorities to afford public housing tenants protection from drug use and violent criminal activity that is essential to the security of their homes.

A. The Question Presented Is Important

Section 1437d(*l*)(6) is based on the premise that drug-related criminal activity by someone living in or visiting a public housing unit poses a threat to innocent neighbors. Accordingly, a tenant who provides the wrongdoing individual the license to be on public housing premises is held responsible, regardless of whether the tenant knew of the drug-related criminal activity. As Judge Sneed explained, the provision thus "facilitates the eviction of truly culpable tenants" and "provides a credible deterrent against criminal activity." Pet. App. 61a.

The court of appeals' decision drains much of the significance from Section 1437d(*l*)(6) as a tool to end the "reign of terror" imposed by drug dealers on public housing tenants. 42 U.S.C. 11901(3); see Pet. 17-19. That is because it will be

difficult for housing authorities to prove the tenant's knowledge in cases like these, in which the drug activity takes place outside the presence of the tenant. In such cases, both the tenant and the person engaging in the criminal drug activity are likely to deny that the tenant had knowledge of it, and the housing authority is likely to find it difficult or impossible to challenge such denials. See Pet. 18-19.

Respondents argue (Br. in Opp. 7) that what they term our "speculation about the practical impact of [the court of appeals' decision] relies on the false assumption that the decision definitively placed the burden on housing authorities to affirmatively prove a tenant's knowledge of drug activity." Our argument, however, does not depend on any assumption about the burden of proof on that issue (although the Ninth Circuit's opinion does suggest in at least one place that the burden rests with the housing authority, see Pet. 17; Pet. App. 28a). Regardless of who has the burden of proof, the tenant and household member are likely to deny that the tenant had knowledge of the criminal activity, and the housing authority is likely to find it difficult or impossible to prove to the contrary. See Pet. 18-19. Accordingly, as the amici state, the en banc Ninth Circuit's decision "impos[es] unnecessary and improper legal impediments to removing criminal elements from public housing, thus diminishing the security and quality of life for all public housing residents." Br. of Amici Housing and Development Law Institute, et al., at 1.

B. There Is A Conflict With State Court Authority

Respondents contend (Br. in Opp. 1-4) that the decision of the court of appeals does not conflict with the decisions in *Minneapolis Public Housing Authority* v. *Lor*, 591 N.W.2d 700 (Minn. 1999), and *Memphis Housing Authority* v. *Thompson*, 38 S.W.3d 504, 512 (Tenn. 2001), petition for cert. pending, No. 00-1861 (filed Jun. 13, 2001). Although a conflict is not a necessary condition to a grant of certiorari,

there is in fact a conflict in this case. The decision of the en banc court of appeals conflicts with the decision of the Minnesota Supreme Court in *Lor*, and it conflicts with the interpretation of Section 1437d(*l*)(6)—although not the holding—of the Tennessee Supreme Court in *Thompson*.

1. Contrary to respondents' claim (Br. in Opp. 4) that the Minnesota Supreme Court did not "analyze or decide" the issues that were before the Ninth Circuit in this case, the Minnesota Supreme Court in *Lor* in fact examined Section 1437d(*l*)(6), HUD regulations, and the Senate report relied upon by the Ninth Circuit. See 591 N.W.2d at 702-703. After considering those materials, the court concluded that the trial court "was bound to determine *only* whether [the tenant's] son engaged in [the] criminal activity and *thus* whether the lease was breached." *Id.* at 704 (emphasis added). The trial court in *Lor* had found that the tenant "did not have any knowledge of her son's criminal activity or reason to anticipate her son's acts," and the Minnesota Supreme Court did not question that finding. *Id.* at 702. Notwithstanding the finding that the tenant did not have knowledge of or reason to anticipate the household member's criminal activities, the Minnesota Supreme Court held that those activities "amount to a material breach of [the tenant's] lease." *Id.* at 704.[1]

After *Lor*, therefore, a tenant in Minnesota cannot claim that, because the tenant had no knowledge of the criminal activity, the tenant cannot be evicted under Section 1437d(*l*)(6) or its implementing regulations and lease terms. Nor could a Minnesota court enjoin a public housing authority from

[1] *Lor* involved a violent shooting by a household member, not drug-related activity, as in this case. Both types of conduct, however, are governed by the same terms in Section 1437d(*l*)(6) permitting eviction for the specified conduct (either threatening criminal conduct or criminal drug-related activity) that is "engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control." 42 U.S.C. 1437d(*l*)(6) (Supp. V 1999). See Pet. 23.

evicting tenants who had no knowledge of the criminal activity. By contrast, the Ninth Circuit held that "the district court properly * * * enjoin[ed] [the public housing authority] from pursuing evictions under [a lease term dictated by Section 1437d(*l*)(6)] to the extent it seeks to do so for off-premises drug-related activity in which the tenant did not know of or have reason to know of the criminal activity." Pet. App. 28a. Under the Ninth Circuit's decision, the tenant's lack of knowledge precludes the public housing authority from evicting the tenant. The Ninth Circuit's decision thus conflicts with *Lor*.

2. The court of appeals' decision does not conflict in result with *Thompson*, because *Thompson* itself involved drug activity by a short-term guest (rather than, as in this case, a household member), and the Tennessee Supreme Court in *Thompson* construed Section 1437d(*l*)(6) to impose less strict standards on the tenant where a guest—rather than a household member—was involved in the drug activity. But the decision of the court of appeals does conflict with the interpretation of Section 1437d(*l*)(6) adopted by the Tennessee Supreme Court in *Thompson*. See Pet. 20-22. The Tennessee Supreme Court unequivocally stated that "both the language of [the tenant's] lease, and the federal statute from which it is derived, clearly impose strict liability upon the resident or household members for engaging in drug-related criminal activity." 38 S.W.3d at 512. By contrast, the Ninth Circuit in this case held that if a tenant, "for a lack of knowledge or other reason, could not realistically exercise control over the conduct of a household member * * *, § 1437d(*l*)(6) does not authorize the eviction of such a tenant." Pet. App. 26a. The tenant's lack of knowledge of the drug activity of a household member completely precludes eviction under the Ninth Circuit's decision; the tenant's lack of knowledge of the drug activity of a household member is of no relevance under the strict liability construction of Section 1437d(*l*)(6) adopted by the Tennessee Supreme

Court. At the very least, *Thompson* sets forth a considered, unequivocal, and very recent construction of Section 1437d(*l*)(6) by the highest court of Tennessee that is in direct conflict with the construction of the statute adopted by the en banc court of appeals in this case.[2]

C. The Case Is Ripe For Review

1. Respondents argue (Br. in Opp. 5) that the fact that "the Ninth Circuit's opinion merely affirms a preliminary injunction * * * alone provides a sufficient basis for denying review." The en banc court of appeals, however, went out of its way to make clear that its conclusions were not based on a tentative view of the meaning of the statute, but on "the proper interpretation of § 1437d(*l*)(6), a question of law which we review de novo" even when it arises on review of a preliminary injunction. Pet. App. 10a; see Pet. 29. And, as we explain in the petition, the court's conclusion regarding the meaning of Section 1437d(*l*)(6) was unequivocal. See Pet. 29. Indeed, the Ninth Circuit presumably decided to render an en banc decision for the very purpose of issuing a definitive ruling on an issue it regarded as being of circuit-wide significance. The Ninth Circuit's construction of Section 1437d(*l*)(6) will govern proceedings on remand in this case, as well as any subsequent appeal. It will also limit the ability of public housing authorities throughout the Ninth Circuit to use Section 1437d(*l*)(6) as a tool to fight drugs in public housing projects. The procedural posture of this case thus does not affect the need for this Court's review. See *United States* v. *Oakland Cannabis Buyers' Cooperative*, 121 S. Ct. 1711, 1716-1717 (2001) (noting grant of certiorari to review legal ruling at preliminary injunction stage).

[2] As we note in the petition (at 22 n.9), the issue in this case is frequently litigated, usually in the state courts. The decision of the court of appeals conflicts with most of the decisions of the lower state courts that have addressed the issue. See Pet. 22 n.9 (citing cases).

2. Respondents also argue (Br. in Opp. 5) that "further proceedings in this case might resolve not only factual disputes but also significant legal issues affecting the very questions that petitioners urge the Court to resolve at this time." In particular, respondents argue (*ibid.*) that the court of appeals did not address "the allocation of the burden of proof under the 'one-strike' lease provision and the showing of knowledge (if any) required in cases where drug activity occurs inside a tenant's apartment unit."

a. There is no reason to delay resolution of the question presented until the Ninth Circuit has finally determined (if it has not done so already, see Pet. 17) the allocation of the burden of proof as to the tenant's knowledge. Indeed, the question of how the burden of proof with respect to the tenant's knowledge should be allocated does not even arise under our view of Section 1437d(*l*)(6), since the ability of the public housing authority to act does not depend on the tenant's knowledge. The en banc Ninth Circuit's decision definitively holds that HUD's regulations are defective because they do permit eviction of owners who are unaware of the drug-related criminal activity. That holding is not subject to further revision on remand or in a later case. Thus, the decision in this case will have a very substantial impact, and warrants further review.

b. There is also no reason to delay review of the question presented here until the court of appeals decides the showing of knowledge required when the drug-related activity takes place within the tenant's housing unit.[3] In many cases

[3] In any event, the Ninth Circuit *did* address the showing required when the drug-related activity takes place in the apartment. The court understood that the district court's decision "creat[ed] a rebuttable presumption that a tenant controls what occurs in his or her unit," and found that approach "perfectly consistent with [its] interpretation of 'control' in § 1437d(*l*)(6)." Pet. App. 29a; see Pet. 17 n.5. Such a "rebuttable presumption" is problematic for the same reasons as the court of appeals' holding in this case, since it permits a tenant and household member to

(like the ones at issue here, see Pet. 21 n.7), the drug-related criminal activity can be expected to occur outside the tenant's apartment, even when it takes place (as it did in two of the instances at issue in this case, see Pet. 6-7) in the parking lot or other grounds of the public housing project. The Ninth Circuit definitively held that a tenant without knowledge of the drug activity cannot be evicted in such a case. For the reasons given above and in the petition, that holding warrants review.

3. HUD has promulgated new regulations implementing Section 1437d(*l*)(6) and related provisions. 66 Fed. Reg. 28,776 (May 24, 2001). The regulatory provisions governing this case, which involve the eviction of tenants for criminal drug activity of household members, are substantively unchanged, although they now take into account the 1996 amendment to Section 1437d(*l*)(6) (see Pet. 4-5), which changed the phrase "on or near such premises" to "on or off such premises." See 66 Fed. Reg. at 28,802-28,803 (promulgating 24 C.F.R. 966.4(f)(12)(ii)(B) and 24 C.F.R. 966.4(*l*)(5)(i)(B)).

The revised regulations do clarify the statutory terms "guest" and "other person under the tenant's control"—neither of which is directly at issue in this case. The overarching principle is that Section 1437d(*l*)(6) "is not qualified by whether the resident knew about or literally 'controlled' the guest's unlawful actions. Rather, the question is one of legal control; by 'control,' the statute means control in the sense that the tenant has permitted access to the premises."

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avoid eviction by denying that the tenant had control over drug use in the apartment—a denial that the public housing authority will find it very hard as a practical matter to challenge. Indeed, the court of appeals' "rebuttable presumption" necessarily contemplates that there will be cases in which the presumption will be rebutted. In such cases, it presumably will be impossible to evict the tenant, regardless of the amount of drug-related criminal activity that occurs in the apartment.

66 Fed. Reg. at 28,781. The preamble to the new regulations accordingly explains:

> In order to distinguish the concept of 'other person' from 'guest,' HUD is defining 'other person under the tenant's control' to mean a short-term invitee who is not 'staying' in the unit. The rule specifies that such a person is only under the tenant's control during the period of the invitation and the person is on the premises because of that invitation.

Id. at 28,777-28,778. The regulations add that, "[a]bsent evidence to the contrary, a person temporarily and infrequently on the premises solely for legitimate commercial purposes is not *under the tenant's control*." *Id.* at 28,792; see also *id.* at 28,782. Thus, the new regulations provide that drug-related criminal activity by a "guest" is a ground for eviction only if it occurs during the period when the person is a guest who is "staying in" the unit; drug-related criminal activity by someone who is an "other person under the tenant's control" is a ground for eviction only if it occurs on the public housing premises; and temporary commercial invitees are not considered to be "other person[s] under the tenant's control." See generally *id.* at 28,781-28,782 (preamble), 28,791-28,792 (§ 5.100 (definitions)), 28,802-28,803 (§ 966.4 (grounds for eviction)).

Those changes are entirely consistent with HUD's longstanding position with regard to the issues in this case, and they do not alter the analysis or affect the question presented. Indeed, because the en banc court of appeals rested its decision on what it concluded was the clear statutory mandate, see Pet. 29, a change in HUD's regulations could not affect the continued authority of that court's decision.

* * * * *

For the reasons given above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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